

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

February 23, 2004

IN RE:

**APPLICATION OF XO TENNESSEE, INC.
TO AMEND ITS CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY TO
PROVIDE TELECOMMUNICATIONS
SERVICES IN THE STATE OF TENNESSEE**

**DOCKET NO.
03-00567**

**INITIAL ORDER GRANTING AMENDMENT TO CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY**

This matter came before the Hearing Officer of the Tennessee Regulatory Authority (the "Authority" or "TRA") at a Hearing held on January 13, 2004, to consider the *Application of XO Tennessee, Inc to Amend its Certificate of Convenience and Necessity* (the "Amendment") filed by XO Tennessee, Inc ("XO") on October 27, 2003.¹ The *Amendment* requests the Authority to amend its certificate of public convenience and necessity to allow XO to offer telecommunications services to customers located in the service areas of Concord Telephone Exchange, Tennessee Telephone Company, Tellico Telephone Company and Humphreys County Telephone Company (collectively "TDS Companies") within the State of Tennessee

¹ See *In re Application of Signal Communications of Tennessee, L L C for a Certificate of Public Convenience and Necessity to Provide Competitive Telecommunications Services within the State of Tennessee*, Docket No 95-02502, Order (September 29, 1995) see *Errata [sic] Erratum*, Docket No 95-02502 (January 12, 1996) Signal Communications of Tennessee, L L C received approval to change its name to NEXTLINK Tennessee, L L C by TRA Order dated April 12, 1996, and, then, NEXTLINK Tennessee, L L C received approval to change its name to XO Tennessee, Inc by TRA Order dated December 19, 2000 Consistent with the law in effect at that time, Signal Communications of Tennessee, L L C 's ("Signal Mountain") certificate prohibited the carrier from offering services in areas served by incumbent carriers, such as TDS Companies, with fewer than 100,000 total access lines "unless such company voluntarily enters into an interconnection agreement with a competing telecommunications services provider" See Tenn Code Ann § 65-4-202(d)

Legal Standard for Granting Certificate of Public Convenience and Necessity

XO's *Amendment* was made pursuant to, and was considered in light of, the criteria for granting a Certificate of Public Convenience and Necessity ("CCN") as set forth in Tenn Code Ann § 65-4-201, which provides, in pertinent part:

(a) No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate .

* * *

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds.

(1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules and orders, and

(2) The applicant possesses sufficient managerial, financial, and technical abilities to provide the applied for services

* * *

(d) Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide

telecommunications services in an area outside its service area existing on June 6, 1995.²

Furthermore, pursuant to Tenn. Code Ann § 65-5-212, a competing telecommunications provider is required to file with the Authority (1) a plan containing the provider's plan for purchasing goods and services from small and minority-owned telecommunications businesses, and (2) information on programs that might provide technical assistance to such businesses.

The January 13, 2004 Hearing

Pursuant to Tenn. Code Ann § 65-4-204, public notice of the Hearing in this matter was issued by the Hearing Officer on December 22, 2003. No persons sought intervention prior to or during the Hearing. At the Hearing held on January 13, 2004, Ms. Dana Shaffer, Vice President and General Counsel for XO in Tennessee participated in the Hearing, presented testimony, and was subject to examination by the Hearing Officer. Henry Walker, Esq., of Boulton, Cummings, Conners & Berry, PLC, 414 Union Street, Suite 1600, P.O. Box 198062, Nashville, Tennessee 37219 appeared on behalf of XO. Upon the conclusion of XO's presentation of proof, the Hearing Officer granted XO's *Application* based upon the following findings of fact and conclusions of law:

² Notwithstanding the existence of subsection (d), the Federal Communications Commission ("FCC") has expressly preempted the Authority's enforcement of subsection (d) pursuant to the authority granted to the FCC under 47 U.S.C. § 253(d). *In the Matter of AVR, LP d/b/a Hyperion of Tennessee, LP Petition for Preemption of Tennessee Code Annotated Section 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Area*, FCC 99-100, (Memorandum Opinion and Order) 14 F.C.C.R. 11,064 (May 27, 1999), (Memorandum Opinion and Order) 16 F.C.C.R. 1247 (January 8, 2001). The Authority has since issued an order expanding a competing local exchange carrier's CCN to provide telecommunications services on a statewide basis including areas served by incumbent local exchange carriers with fewer than 100,000 total access lines in Tennessee. *See In re Application of Level 3 Communications, LLC to Expand its CCN to Provide Facilities-Based Local Exchange and Interexchange Telecommunications Services in all Tennessee Service Areas*, Docket No. 02-00230, *Order Approving Application of Level 3 Communications, LLC to Amend Its Certificate of Public Convenience and Necessity* (June 28, 2002).

I. XO's Qualifications

1 XO is a corporation originally organized under the laws of the State of Washington on January 26, 1995, and was qualified to do business in the State of Tennessee on June 19, 1998.

2 The complete street address of XO's corporate service provider is XO Tennessee, Inc., 105 Molloy Avenue, Suite 300, Nashville, Tennessee 37201. The telephone number is (615) 777-7700 and the facsimile number is (615) 850-0343.

3. The *Amendment* and supporting documentary information existing in the record indicate that XO has the requisite technical and managerial ability to provide competing local exchange telecommunications services within the State of Tennessee. Specifically, XO's senior management team possesses extensive business, technical, operational and regulatory telecommunications experience

4. XO has the necessary capital and financial ability to provide the services it proposes to offer

5 XO has represented that it will adhere to all applicable policies, rules and orders of the Authority.

II. Proposed Services

XO intends to offer telecommunications services to customers located in the service areas of Concord Telephone Exchange, Tennessee Telephone Company, Tellico Telephone Company and Humphreys County Telephone Company (collectively "TDS Companies") within the State of Tennessee.

III. Permitting Competition to Serve the Public Convenience and Necessity

Upon a review of the *Application* and the record in this matter, the Hearing Officer finds that approval of XO's *Application* would inure to the benefit of the present and future public convenience by permitting competition in the telecommunications services markets in the State and by fostering the development of an efficient, technologically advanced statewide system of telecommunications services

IV. Small and Minority-Owned Telecommunications Business Participation Plan and Business Assistance Program

1 XO has filed a satisfactory small and minority-owned telecommunications business participation plan, pursuant to Tenn. Code Ann. § 65-5-212 and the Authority's Rules

2. XO has acknowledged its obligation to contribute to the funding of the small and minority-owned telecommunications business assistance program, as set forth in Tenn. Code Ann. § 65-5-213

V. Compliance with Tennessee's County-Wide Calling Requirements

1 XO has indicated its awareness of, and its obligation to comply with, the requirements of county-wide calling as set forth in Tenn Code Ann § 65-21-114

IT IS THEREFORE ORDERED THAT:

1 The *Application of XO Tennessee, Inc to Amend its Certificate of Convenience and Necessity* to offer telecommunications services to customers located in the service areas of Concord Telephone Exchange, Tennessee Telephone Company, Tellico Telephone Company and Humphreys County Telephone Company within the State of Tennessee is approved, and

2. Any party aggrieved by the Hearing Officer's decision in this matter may file a petition for reconsideration within fifteen (15) days from and after the date of this Order.

A handwritten signature in black ink, appearing to read "Randal Gilliam", is written over a horizontal line.

Randal Gilliam, Hearing Officer